Alliance Bank Malaysia Bhd v W Shalihudin bin W Ibrahim and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS D3–22–240 OF 2007 AND D33–22–1589 OF 2008
HAMID SULTAN J
20 MARCH 2012

Banking — Securities for advances — Sale of — Whether disposal of shares by bank was proper — Whether surreptitious sale of shares — Whether sale was in breach of contract, unconscionable, against legitimate expectation and against express representations

Civil Procedure — Declaration — Claim, for — Claim for declaratory relief as remedy for breach of contract — Whether allowable — Whether abuse of process of court — Specific Relief Act 1950 s 41

Contract — Breach — Remedies — Remedy for breach of contractual terms lie within Contracts Act 1950 — Whether parties may claim declaratory relief instead

Contract — Collateral contract — Nature of — Ancillary contract antecedent or contemporaneous to main contract — Oral collateral contract — Whether established

Contract — Construction — Oral agreement — Oral agreement by corporate personalities relating to corporate transaction — Whether readily accepted by courts

Evidence — Inferences — Adverse inference under s 114(g) of the Evidence Act 1950 — Burden of proof placed on plaintiff not to be compromised by invoking adverse inference against defendant

On 21 November 2000, a vesting order vested all assets and liabilities of one International Bank Malaysia Bhd ('IBMB') with the plaintiff. IBMB had extended an overdraft facility of RM9,273,000 to the borrower ('Shalihudin/defendant') (the 'overdraft facility'). IBMB and the defendant executed letters of offer and a facility agreement dated 25 February 2000. The security for the overdraft facility was provided by the third party ('Ceramtec Sdn Bhd') by pledging its shares Goh Ban Huat Bhd ('GBH') to the plaintiff.

In December 2003, due to the OD facility being in arrears, the parties had held discussions and it was claimed that the following terms were agreed upon during the discussions: (a) Ceramtec would continue to pledge its GBH shares as security for the facility; (b) Ceramtec would pledge more shares if requested to do so by the plaintiff; and (c) if the plaintiff were to ever consider force-selling Ceramtec's pledged shares, Ceramtec would be notified and given the opportunity to redeem their pledged shares (the 'collateral contract'). The OD Facility was then renewed in writing. Throughout 2004, the OD facility remained in arrears. However, the plaintiff never terminated the facility and never touched Ceramtec's pledged shares. The plaintiff did however request for another further pledge of shares, and Ceramtec acquiesced by pledging more of its GBH shares. The facility still remained in arrears. In September 2006, Ceramtec discovered that the plaintiff had sold off its entire block of pledged shares in a single day in September 2006 (the 'surreptitious sale'). The plaintiff claimed that the sale was based on its letter of demand some 13 months earlier. Ceramtec claimed that the sale was a, inter alia, breach of contract; unconscionable transaction; acting against a legitimate expectation; and acting against express representations. Ceramtec thus claimed against the plaintiff for loss and damage arising from the sale of shares. The plaintiff claimed against the defendant for the indebted sum. The defendant raised a counterclaim seeking several declarations, including a declaration that the shares were sold in breach of the alleged collateral contract with Ceramtec. Counsel for Ceramtec invited the court to invoke s 114(g) of the Evidence Act 1950 ('Act') for the plaintiff's failure to call some of the witnesses who were relevant to deny Ceramtec's and the defendant's allegations.

Held, allowing the plaintiff's claim against the defendant and dismissing the claim and counterclaim by Ceramtec and the defendant respectively against the plaintiff:

(1) Collateral contract has specific meaning. It is one related to, but ancillary to the main contract. A collateral contract may be either antecedent or contemporaneous to the main contract. In essence, it is meant to exist side by side with the main contract. Any contract after the main contract will not fall within the popular definition of collateral contract. Once the main contract is entered into, and come into existence, any other terms or variations are not labeled as collateral contract but supplemental agreement, variation, addition and deletion etc; *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133 referred (see para 7–8).

(2) In this time and era any allegation of oral agreement that too by corporate personalities relating to corporate transaction, must be frowned by courts (see para 8).

(3) Ceramtec's version relating to a collateral contract, inter alia, lacked jurisprudence, and also credibility, as the alleged collateral contract was

not documented in any manner, except that it appeared for the first time in the pleadings. In addition, there was no basis in the evidence to say the sale was done in bad faith or otherwise to give any credence to the words 'surreptitious sale'. The words 'surreptitious sale' stood as an exaggeration (see para 18).

(4) In essence the defendant was a borrower subject to facility terms. If there was a breach of any contractual terms his remedy lay within the Contracts Act 1950. Raising a counterclaim in the form of declaration did not subscribe to s 41 of the Specific Relief Act 1950. It was an abuse of process of court. In consequence the declaratory prayers which were discretionary reliefs ought to have been dismissed in limine (see para 20).

(5) Ceramtec had agreed to the terms of the third party memorandum of deposit which showed Ceramtec's express, written agreement that: (i) Ceramtec had no right of redemption; (ii) Ceramtec had no equity over the pledged shares; (iii) Ceramtec did not have to be notified of the sale; (iv) the plaintiff did not need Ceramtec's consent to sell the shares; and (v) these rights conferred on the plaintiff by Ceramtec were irrevocable (see para 24(d)).

(6) It is settled law that he who alleges must prove and this is also a strict requirement of the Evidence Act 1950. Ceramtec and the defendant for the counterclaim stood as plaintiffs for their respective case. There is no civil case where the court has compromised the burden of proof placed on the plaintiff by invoking s 114(g) of the Act in the manner counsel for Ceramtec was inviting the court to do (see para 24(e)).

(7) Taking into consideration the volatile nature of share prices, it could not be said to be unreasonable for the bank to sell shares in a surreptitious manner if the terms of the contract provided for, as in the instant case. The plaintiff had not breached any of its obligations in the sale of share as provided in the facility terms and/or conducted itself unfairly in breach of the contractual terms (see para 24(g)).

[Bahasa Malaysia summary

Pada 21 November 2000, suatu perintah letakhak telah meletakhakkan kesemua aset dan liabiliti International Bank Malaysia Bhd ('IBMB') kepada plaintif. IBMB telah memberikan kemudahan overdraf sebanyak RM9,273,000 kepada peminjam (Shalihudin/defendan) ('kemudahan overdraf'). IBMB dan defendan memeterai surat tawaran dan perjanjian kemudahan bertarikh 25 Februari 2000. Sekuriti untuk kemudahan overdraf disediakan oleh pihak ketiga ('Ceramtec Sdn Bhd') dengan mencagarkan saham-sahamnya Goh Ban Huat Bhd ('GBH') kepada plaintif. Pada Disember 2003, disebabkan oleh kemudahan OD yang tertunggak, pihak-pihak telah mengadakan perbincangan dan adalah didakwa bahawa terma-terma berikut telah dipersetujui semasa perbincangan: (a) Ceramtec akan terus mencagarkan

saham-saham GBH sebagai cagaran bagi kemudahan; (b) Ceramtec akan mencagarkan lebih saham apabila diminta oleh plaintif; dan (c) jika pun plaintif pernah mempertimbangkan kuasa menjual saham-saham Ceramtec tersebut secara paksa, Ceramtec akan dimaklumkan dan diberi peluang untuk menebus saham-saham mereka yang telah dicagarkan ('kontrak kolateral'). Kemudahan OD kemudiannya diperbaharui secara bertulis. Sepanjang tahun 2004, kemudahan OD kekal tertunggak. Walau bagaimanapun, plaintif tidak pernah menamatkan kemudahan dan tidak pernah menyentuh saham-saham yang dicagarkan oleh Ceramtec. Plaintif bagaimanapun telah meminta cagaran lanjut saham-saham, dan Ceramtec akur dengan mencagarkan lebih saham GBH. Kemudahan tersebut masih kekal tertunggak. Pada September 2006, Ceramtec mendapati bahawa plaintif telah menjual keseluruhan blok saham yang dicagarkan dalam satu hari pada bulan September 2006 ('surreptitious sale'). Plaintif mendakwa bahawa jualan tersebut adalah berdasarkan surat tuntutan kira-kira 13 bulan lebih awal. Ceramtec mendakwa bahawa jualan tersebut, antara lain, adalah suatu pelanggaran kontrak, transaksi tidak adil; bertindak terhadap tanggapan yang sah dan bertindak terhadap representasi nyata. Ceramtec seterusnya menuntut terhadap plaintif bagi kerugian dan kerosakan yang timbul daripada penjualan saham-saham tersebut. Plaintif menuntut terhadap defendan bagi jumlah terhutang. Defendan menuntut balas dan memohon beberapa deklarasi, termasuk suatu deklarasi bahawa saham-saham telah dijual adalah melanggar kontrak kolateral yang didakwa, dengan Ceramtec. Peguam Ceramtec memohon kepada mahkamah untuk membangkitkan s 114(g) Akta Keterangan 1950 ('Akta') atas kegagalan plaintif memanggil beberapa saksi yang relevan untuk menafikan dakwaan Ceramtec dan defendan.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan dan menolak tuntutan dan tuntutan balas oleh Ceramtec dan defendan masing-masing terhadap plaintif:

(1) Kontrak kolateral mempunyai makna tertentu. Ia adalah sesuatu yang berkaitan, tetapi bersampingan kepada kontrak utama. Satu kontrak kolateral boleh sama ada terdahulu atau semasa dengan kontrak utama. Pada dasarnya, ia bertujuan untuk wujud bersampingan dengan kontrak utama. Mana-mana kontrak selepas kontrak utama tidak akan jatuh dalam takrif kebiasaan bagi kontrak cagaran. Setelah kontrak utama dimasuki, dan wujud, terma-terma lain atau variasi tidak dilabel sebagai kontrak kolateral tetapi sebagai perjanjian tambahan, variasi, tambahan dan pemotongan; *Hoyt Pty Ltd v Spencer* (1919) 27 CLR 133 disebut (lihat perenggan 7–8).

(2) Pada masa ini dan era di mana sebarang dakwaan mengenai perjanjian lisan bahawa tokoh korporat yang berkaitan dengan transaksi korporat, mestilah tidak disetujui oleh mahkamah (lihat perenggan 8).

(3) Versi Ceramtec berhubung dengan kontrak kolateral, antara lain, tiada jurisprudens, dan juga kredibiliti, kerana kontrak kolateral yang didakwa tidak didokumenkan dalam apa-apa cara, kecuali bahawa ia timbul buat kali pertama dalam pliding. Di samping itu, tiada asas dalam keterangan untuk mengatakan bahawa jualan tersebut dilakukan dengan niat jahat atau sebaliknya untuk memberi apa-apa kepercayaan kepada perkataan 'surreptitious sale'. Perkataan 'surreptitious sale' adalah keterlaluan (lihat perenggan 18).

(4) Pada dasarnya defendan adalah seorang peminjam yang tertakluk kepada terma kemudahan. Jika terdapat pelanggaran mana-mana terma kontrak, remedinya termaktub dalam Akta Kontrak 1950. Membangkitkan suatu tuntutan balas dalam bentuk deklarasi tidak mengikut s 41 Akta Relief Spesifik 1950. Ia adalah satu penyalahgunaan proses mahkamah. Akibatnya, permohonan deklarasi yang merupakan relief budi bicara sepatutnya telah ditolak *in limine* (lihat perenggan 20).

(5) Ceramtec telah bersetuju dengan terma-terma memorandum deposit pihak ketiga yang menunjukkan Ceramtec dengan nyata, perjanjian bertulis bahawa: (i) Ceramtec tiada hak untuk menebus; (ii) Ceramtec tidak mempunyai ekuiti ke atas saham-saham yang dicagarkan; (iii) Ceramtec tidak perlu diberitahu mengenai jualan tersebut; (iv) plaintif tidak memerlukan persetujuan Ceramtec untuk menjual saham; dan (v) hak-hak yang diberikan kepada plaintif oleh Ceramtec tidak boleh ditarik balik (lihat perenggan 24(d)).

(6) Ia adalah undang-undang tetap bahawa siapa yang menuduh mestilah membuktikannya dan ini juga merupakan keperluan ketat Akta Keterangan 1950. Bagi tuntutan balas tersebut, Ceramtec dan defendan bertindak sebagai plaintif bagi kes masing-masing. Tiada kes sivil di mana mahkamah mengkompromikan beban pembuktian agar terletak ke atas plaintif dengan membangkitkan s 114(g) Akta Keterangan 1950 yang mana peguam bagi Ceramtec mencadangkan kepada mahkamah (lihat perenggan 24(e)).

(7) Mengambil kira sifat yang tidak menentu harga saham, ia tidak boleh dikatakan tidak munasabah bagi bank untuk menjual saham secara diam-diam jika terma-terma kontrak adalah tersedia, seperti dalam kes ini. Plaintif tidak melanggar mana-mana obligasinya dalam penjualan saham sebagaimana yang diperuntukkan dalam terma-terma kemudahan dan/atau bertindak tidak adil dalam melanggar terma kontrak (lihat perenggan 24(g)).]

Notes

For a case on sale of securities for advances, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2648.

For cases on constuction in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3656–3659.

For cases on declaration, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2516–2585.

For cases on inference, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2066–2070.

For cases on nature of collacteral contract, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3539–3541.

For cases on remedies, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3154–3158.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors & another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202; [1989] 1 CLJ 693, HC (refd)

Armagas Ltd v Mundogas SA (The 'Ocean Frost') [1986] 2 All ER 385, HL (refd)

Bank Bumiputra Bhd v Malek & Joseph Au [1995] 4 MLJ 251, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Merchant Bank Bhd [1985] 3 MLJ 331; [1985] 4 CLJ 283, FC (refd)

Charles Rickards LD v Oppenhaim [1950] 1 KB 616, CA (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Anor Appeal [1996] 2 MLJ 517; [1996] 2 AMR 223, FC (refd)

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283, HC (refd)

China and South Sea Bank Ltd v Tan [1989] 3 All ER 839, PC (refd)

Chong Kow v Kesavan Govindasamy [2009] 8 MLJ 41, HC (refd)

Combe v Combe [1951] 2 KB 215, CA (refd)

Cryne v Barclays Bank plc [1987] BCLC 548, HC (refd)

Cuckmere Brick Co Ltd & Another v Mutual Finance Ltd [1971] 1 Ch 949, CA (refd)

Dato' Abd Rahim bin Mohamad v Abdul Farish bin Rashid [2008] MLJU 652; [2009] 1 CLJ 395, CA (refd)

Demerges v Sandeman, Clark & Co [1902] 1 Ch 579 (refd)

Deokali Koer v Kedar Nath (1912) 39 Cal 704, HC (refd)

Dick Bentley Productions, Ltd & Anor v Harold Smith (Motors) Ltd [1965] 2 All ER 65, CA (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 WLR 1078, CA (refd)

Gan Eng San & Anor v Alliance Investment Bank & Ors [2010] 7 MLJ 615, HC (refd)

Gek Lau Choon Theatrical Company v Hu Kiang Yan [1937] 1 MLJ 25 (refd)

Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257, PC (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)
Heilbut Symoons & Co v Buckleton [1913] AC 30, HL (refd)
Hartley v Hymans [1920] 3 KB 475, KBD (refd)
Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd [1999] 1 SLR 14, CA (refd)
Hock Huat Iron Foundry (Suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65; [1999] 1 CLJ 89, CA (refd)
Hoyt's Pty Ltd v Spencer (1919) 27 CLR 133, CA (refd)
Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433, HC (refd)
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85, PC (refd)
Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2010] MLJU 1869; [2011] 7 CLJ 442, HC (refd)
Kong Ming Bank Bhd v Leong Ho Yuen [1982] 2 MLJ 111, FC (refd)
Latham v Credit Suisse First Boston [2000] 2 SLR 693, CA (refd)
Lin Wen-Chih & Lin Wen-Chuan v My com Bhd [2010] 1 LNS 1145, CA (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)
Miller v Cook (1870) LR 10 Eq 641 (refd)
Pengkalen Securities Sdn Bhd v Kemas Ria Sdn Bhd & anor [2010] MLJU 1529; [2009] 1 LNS 909, HC (refd)
Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn Bhd & Ors [2004] 4 MLJ 327, HC (refd)
Public Bank Bhd v Rahmat bin Harun [2010] MLJU 1145; [2010] 1 LNS 1553 (refd)
RHB Bank Bhd (formerly known as DCB Bank Bhd) v Samaworld Asia Sdn Bhd & Anor [2007] 3 MLJ 170, HC (refd)
Sabu Development Sdn Bhd v Kelik anak Bayel [2007] 8 MLJ 264; [2007] 9 CLJ 475, HC (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (Executor of the Estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)
Samaworld Asia Sdn Bhd & Anor v RHB Bank Bhd [2008] 6 CLJ 44, CA (refd)
Sanyan Lumber Sdn Bhd v Sanyan Wood Industires Sdn Bhd [2008] 8 MLJ 336, HC (refd)
Satriadesa Corporation Sdn Bhd v Kerajaan Malaysia and Anor [2010] MLJU 1416, HC (refd)
Scottish Hydro-Electric plc v Ismestieff and another [1999] All ER (D) 1453, CD (refd)
Seow Mui Kim v Perwira Habib Bank & Ors [1987] 1 MLJ 46 (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157, CA (refd)

Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading [1972] 1 MLJ 21 (refd)
Silven Properties Ltd and another v Royal Bank of Scotland plc and others [2004] 4 All ER 484, CA (refd)
Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight [1983] 1 MLJ 220, FC (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Udayakumar a/l Suppiah v Ganga Tharan a/l Shanmugam [2011] 7 MLJ 429, HC (refd)
Waja Manufacturing (M) Sdn Bhd (fomerly known as Palsticon Pet (M) Sdn Bhd) v Alliance Bank Malaysia Bhd and another appeal [2011] 1 MLJ 611, FC (refd)
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Legislation referred to

Contracts Act 1950 s 129
Evidence Act 1950 s 114(g)
Specific Relief Act 1950 s 41

Cecil Abraham (Rishwant Singh and Gandhi Mohan Maniam with him) (Zulrafique & Partners) for the plaintiff in Suit No D3–22–240 of 2007.
Loh Siew Cheang (Choo Jun Lin with him) (Cheang & Ariff) for the defendant in Suit No D3–22–240 of 2007.
Christopher Leong (TS Lim and Liz Yap with him) (Chooi & Co) for the plaintiff in Suit No D3–22–1589 of 2008.

Hamid Sultan J:

[1] This is my judgment in respect of the borrower ('Shalihudin (defendant)') and third party ('Ceramtec'), mortgagor of shares, in essence, claiming against the bank ('Alliance Bank') for loss and damage for sale of shares in breach of alleged collateral contract and/or surreptitious sale of the mortgaged shares, and the claim of Alliance Bank against the defendant for the balance sum due and owing under the facility terms.

[2] The parties have agreed that the issue of liability to be decided first and the issue of quantum for loss and damage (if any) can be referred to the deputy registrar for assessment of damages.

[3] This judgment involves two suits, which have been consolidated. The details are as follows:

(a) in Suit No D3–22–1589 of 2008, Ceramtec is the plaintiff, and claims against Alliance Bank for loss and damage arising from the sale of shares. The prayers read as follows:

And the plaintiff claims:

(i) Damages for loss of the benefit of the 11,420,286 shares pledged by the plaintiff to the defendant;

(ii) Further, or in the alternative to (i) above, damages for conversion;

(iii) Further, or in the alternative to (i) and/or (ii) above, damages for misrepresentation;

(iv) Further, or in the alternative to (i), (ii) and/or (iii) above, damages for breach of contract;

(v) Further, or in the alternative to (i) to (iv) above, an order that the defendant:

(A) do restore the 11,420,286 shares pledged by the plaintiff to the defendant, by way of purchase from the open market or otherwise; and

(B) do to transfer such shares to the plaintiff within 21 days of an order made herein;

(vi) Interest at the rate of 8% per annum from the date of judgment to the date of full payment upon all sum found to be due to the plaintiff;

(vii) Costs; and

(viii) Such further or other relief as this Honourable Court deems fit.

(b) in Suit No D2–22–240 of 2007, Alliance Bank is the plaintiff, and claims against the defendant for the indebted sum. The defendant has raised a counterclaim seeking several declarations, including a declaration that the shares were sold in breach of the alleged collateral contract with Ceramtec. The prayers in the said counterclaim read as follows:

WHEREFORE the defendant claims:

(a) Declaration that in all the circumstances that the Plaintiff acted wrongfully or in bad faith or both and without prejudice to the generality of the foregoing, without the prior approval of the Securities Commission, or without prior notice to the Defendant, or by acting on the stale demand dated 18.7.2005, or contrary to the representations made on 15.5.2006 that the Defendant would have time until 31.12.2006 to liquidate his account, or for a combination of one or more reasons aforesaid in forced selling the Private Placement Shares at approximately RM0.60 in the month of September 2006;

(b) Declaration that in all the circumstances, the Plaintiff acted wrongfullyand in bad faith when it demanded repayment from Ceramtec for a sum of RM9,341,861.55 on 15.8.2005 when Ceramtec was not a debtor but a third parties securities provider under the Ceramtec's Pledges subject to the collateral contract;

(c) Declaration that the letter of demand dated 15.8.2005 to Ceramtec was an unlawful demand, it being that Ceramtec was under no obligation whether in law or in equity to honour the demand as if it were the debtor and not a third party securities provider;

(d) Declaration that there was a collateral contract between the Plaintiff, the Defendant and Ceramtec that in the event the Plaintiff was compelled to forcibly liquidate the account of the Defendant, Ceramtec would be given prior reasonable notification that all shares pledged by Ceramtec were redeemable or were to be redeemed by Ceramtec at the then prevailing market price;

(e) Declaration that the letter of demand dated 15.8.2005, albeit wronglygiven, having specified a period of 7 days for Ceramtec to pay RM9,341,861.55, the Plaintiff ought to have acted promptly on the demand by either force selling the shares pledged by Ceramtec on 22.8.2005 or at any reasonable time thereafter but not in any event in the month of September 2006 when the price of GBH shares had fallen to approximately RM0.60 per share.

(f) An Order that the Plaintiff acted in breach of the bargain that was struck on 15.5.2006 between the parties in circumstances when the Plaintiff secretively force sold the Private Placement Shares and the shares under the Ceramtec's Pledges (subject to collateral contract) in the month of September 2006;

(g) Declaration that the Plaintiffs Certificate of Indebtedness dated 5.10.2006 is not binding on the Defendant;

(h) An Order for the restitution of the Private Placement Shares and shares under the Ceramntec's Pledges constituting a controlling block in GBR;

(i) As an alternative to prayer (h) above, the Plaintiff is to pay damages to the Defendant in an amount to be determined by this Honourable Court in mitigation of the Defendant's indemnity to Ceramtec;

(j) Damages to be assessed by this Honourable Court for breach of thematters averred to in this Defence and Counterclaim;

(k) Costs;

(l) Such further and other reliefs as this Honourable Court shall deem fit.

[4] It must be noted that the above declarations are framed in a wide manner, and inconsistent with the spirit and intent of declaratory reliefs, as advocated in s 41 of the Specific Relief Act 1950, and case laws. It is trite that declaratory relief is discretionary relief, and is not an alternative remedy for contractual breach. There is no obligation for the court to even consider the declaratory prayers, which are prolix in nature, and inconsistent with the norms and jurisprudence relating to declaratory relief.

[5] I have captured the jurisprudence relating to declaratory prayers to some extent in *Sabu Development Sdn Bhd v Kelik anak Bayel* [2007] 8 MLJ 264; [2007] 9 CLJ 475. I do not wish to repeat the same, save to say that in *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham* [1998] 4 MLJ 451; [1998] 4 CLJ 812, Gopal Sri Ram JCA asserted as follows:

> It is beyond dispute that the remedy of declaration is discretionary in nature. Section 41 of the Specific Relief Act 1950 reads as follows:
>
> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:*
>
> *Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.*
>
> *Explanation – A trustee of property is a person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.* (Emphasis added.)
>
> Although s 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v Zauyah Wan Chik* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490, at p 507 per Lord Sterndale MR) yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v Government of Sarawak* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd v Lye Thai Sang* [1985] 2 CLJ 423; [1985] 2 MLJ 380) or other inequitable conduct (*City of London v Horner* [1914] 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik v Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

[6] It is pertinent to note that:

(a) the central allegation is the existence of a collateral contract in a continuing facility, and the said collateral contract is not alleged to have been made at the time the letter of offer and/or the facility was first granted, ie in the year 1999 or year 2000, respectively, but in the year 2003. The allegation of the said collateral agreement is not supported by any contemporaneous documents, and the issue was raised for the first

time in the pleadings. The parties who are alleging the existence of collateral contract are not lay persons, and in fact, are prominent corporate personalities; and

(b) the issue relating to surreptitious sale, though will appear to be within the contractual rights of Alliance Bank, need to be considered in the right perspective based on case laws, and the factual matrix of the instant case.

[7] It must also be noted that collateral contract has specific meaning. It is one related to, but ancillary to the main contract. In *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133, it was said that a collateral contract may be either antecedent or contemporaneous to the main contract. In essence, it is meant to exist side by side with the main contract. Any contract after the main contract will not fall within the popular definition of collateral contract as advocated in a number of leading cases on this subject. To name a few are as follows: (i) *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16; (ii) *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788; and (iii) *Heilbut Symoons & Co v Buckleton* [1913] AC 30.

[8] Once the main contract is entered into, and come into existence, any other terms or variations are not labeled as collateral contract but supplemental agreement, variation, addition and deletion etc. Usually, the main contract itself will make provisions on how such variations ought to be made and it will specifically state that it has to be in writing. In this time and era any allegation of oral agreement that too by corporate personalities relating to corporate transaction, must be frowned by courts. In *Sanyan Lumber Sdn Bhd v Sanyan Wood Industires Sdn Bhd* [2008] 8 MLJ 336, I have made the following observations:

> The plaintiffs rely greatly on my judgment in *Tang Sing Wung v Genesis Force Sdn Bhd* (Sibu Civil Appeal No 12–9 of 2007) where it was stated:
>
> (i) The appellant in the entire submission placed great emphasis on the oral agreement. However, as a matter of fact the learned sessions judge had not totally accepted the appellant's version. In my view, courts should give very little weight to allegation of oral agreement in this time and era and more so when they are dealing with corporate entities (see *Dato Ting Check Sii v Datuk Hj Mohamad Tufail bin Mahmud & Ors* [2007] 5 MLJ 339; [2007] 7 MLJ 727).
>
> (ii) The early part of the common law jurisprudence on contract developed on the basis that people resorted almost in all cases to oral evidence. As literacy level grew, written agreements became more popular. This resulted in the introduction of evidential rules which did not as a general rule allow written documents to be displaced by oral agreements. Almost all of these rules as to evidence have been encapsulated in our Evidence Act 1950. In this case, the appellant alleges oral agreement subsequent to the written agreement but has not put the terms of the agreement in writing

> contemporaneously and sent it to the respondent, which is a corporate entity. Further, there is no good reason given as to why the oral agreement of such an important matter was not put in writing. Courts generally will not accept sympathy evoking stories of oral agreement at this time and era, when not only has literacy level increased but also the awareness of legal right, and need for documentation, such as written agreements, delivery order invoices etc. In this case, the appellant has entered into a written agreement, has also issued invoices, but has not reduced the oral aspect into writing. On such facts, court will not ordinarily lend credence to the appellant's version as such precedent will promote unhealthy litigation and it is not in the public interest to do so, taking into consideration that such oral agreements can almost in all circumstances be contemporaneously reduced in writing. On this subject, I will go to the extent of saying that court should invoke adverse presumption against parties who attempt to introduce oral agreement in civil cases where there is ample opportunity contemporaneously to reduce it in writing.

[9] I am mindful of the observation of Lord Denning in *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078 where it was observed:

> When a person gives a promise or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding.

[10] However, when it comes to oral evidence, unlike England, we have specific, statutes to regulate it. The Evidence Act 1950 does not permit oral evidence to be admitted per se. In *Latham v Credit Suisse First Boston* [2000] 2 SLR 693, Yong Pung How CJ in construing a similar provision found in our Evidence Act 1950, had this to say:

> In our judgment, it (s 94(b)) could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of apart oral, part written contract. Section 94(b) only allows the admission of evidence of a collateral contract on matters which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221.

[11] If there is a collateral contract in writing, it has high probative value in respect of its terms. If the collateral contract is not evidence in writing, or after the execution of the main contract, it is not subsequently referred to in writing, then in evidential terms, the allegation will lack credibility, and the version alleged will stand as a story incapable of being made admissible under the Evidence Act 1950, if the story is inconsistent with the terms of the main contract.

[12] In the instant case the letter dated 17 December 2003 at pp 598–600 cannot be a basis to allege a new contract has come into existence. The allegation that the said letter was issued pursuant to a 'collateral contract', the label used by Ceramtec and defendant in respect of a continuing facility, does not subscribe to the jurisprudence of collateral contract.

[13] The parties have relied on the following cases: *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ 693; *Udayakumar a/l Suppiah v Ganga Tharan a/l Shanmugam* [2011] 7 MLJ 429; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors & another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *Dick Bentley Productions, Ltd & Anor v Harold Smith (Motors) Ltd* [1965] 2 All ER 65; *Dato' Abd Rahim Mohamad v Abdul Farish Rashid* [2009] 1 CLJ 395; *Combe v Combe* [1951] 2 KB 215; *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85; *Satriadesa Corporation Sdn Bhd v Kerajaan Malaysia and Anor* [2010] MLJU 1416; *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; *Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220; *Miller v Cook* (1870) LR 10 Eq 641; *Demerges v Sandeman, Clark & Co* [1902] 1 Ch 579; *Seow Mui Kim v Perwira Habib Bank & Ors* [1987] 1 MLJ 46; *Hock Huat Iron Foundry v Naga Tembaga Sdn Bhd (suing as a firm)* [1999] 1 MLJ 65; [1999] 1 CLJ 89; *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* [1972] 1 MLJ 21; *Charles Rickards LD v Oppenhaim* [1950] 1 KB 616; *Hartley v Hymans* [1920] 3 KB 475; *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245; *Boustead Trading (1985) Sdn Bhd v Arab-Merchant Bank Bhd* [1985] 3 MLJ 331; [1985] 4 CLJ 283; *Kong Ming Bank Bhd v Leong Ho Yuen* [1982] 2 MLJ 111; *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283; *Cryne v Barclays Bank plc* [1987] BCLC 548; *Gan Eng San & Anor v Alliance Investment Bank & Ors* [2010] 7 MLJ 615; *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2010] MLJU 1869; [2011] 7 CLJ 442; *Cuckmere Brick Co Ltd & Another v Mutual Finance Ltd (CA)* [1971] 1 Ch 949; *Pengkalen Securities Sdn Bhd v Kemas Ria Sdn Bhd & Datuk David Yeoh Eng Hock* [2010] MLJU 1529; [2009] 1 LNS 909; *Heilbut, Symons & Co v Buckleton* [1913] AC 30; *Gek Lau Choon Theatrical Company v Hu Kiang Yan* [1937] 1 MLJ 25; *Tan Swee Hoe Co Ltd v AH Hussain Bros* [1980] 2 MLJ 16; *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433; *Bank Bumiputra Bhd v Malek & Joseph Au* [1995] 4 MLJ 251; *Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd* [1999] 1 SLR 14; *Scottish Hydro-Electric plc v Ismestieff and another* [1999] All ER (D) 1453; *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; *Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn Bhd & Ors* [2004] 4 MLJ 327; *RHB Bank Bhd (formerly known as DCB Bank Bhd) v Samaworld Asia Sdn Bhd & Anor* [2007] 3 MLJ 170; [2008] 6 CLJ 44; *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157; *Chong Row v Kesavan Govindasamy* [2009] 8 MLJ 41; *Public Bank Berhad v Rahmat bin Harun* [2010] MLJU 1145; [2010] 1 LNS 1553; *Lin Wen-Chih & Lin*

Wen-Chuan v My com Bhd [2010] 1 LNS 1145; *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839; *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662; *Silven Properties Ltd and another v Royal Bank of Scotland plc and others* [2004] 4 All ER 484; *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *"")"">Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1986] All ER 385; *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257; *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Anor Appeal* [1996] 2 MLJ 517; [1996] 2 AMR 223.

BRIEF FACTS

[14] The brief summaries of facts have been well articulated by the parties in encls 36, 39 and 37. The judicial time in writing the judgment will be much saved by repeating the same.

[15] Alliance Bank's summary of case in encl 36 reads as follows:

(1) On 21.11.2000, a vesting order vested all assets and liabilities of one International Bank Malaysia Berhad ('IBMB') with the Plaintiff.

(2) IBMB had Extended an Overdraft Facility of RM9,273,000.00 to the Defendant (the 'Overdraft Facility'). IBMB and the Defendant executed the following documents –

  (i) IBMB's Letter of Offer dated 24.12.1999;

  (ii) Facility Agreement dated 25.2.2000;

  (iii) A revised Letter of Offer dated 17.12.2003; and

  (iv) The Plaintiffs Supplemental Letter dated 13.1.2005.

(3) There was security for the Overdraft Facility. The security comprised of the following —

  (i) A Memorandum of Deposit dated 25.2.2000 with the Defendant; and

  (ii) A Memorandum of Deposit dated 25.2.2000 with Ceramtec Sdn Bhd.

(4) The details of the Overdraft Facility are pleaded in paragraph 6 of the Statement of Claim.

(5) The Defendant breached the Overdraft Facility and did not rectify its breach.

(6) A demand was made by the Plaintiff on the Defendant. That demand was not complied with.

(7) This claim was accordingly filed by the Plaintiff to recover a sum of RM367,739.95, contractual and legal interest and costs.

[16] Ceramtec's summary of case in encl 37 reads as follows:

(1) Ceramtec's claim against Alliance Bank Berhad (the 'Bank') is based on a surreptitious sale of the controlling stake held by Ceramtec in a main board listed company, namely Goh Ban Huat Berhad ('GBH'). The surreptitious sale, which happened in September 2006, caused Ceramtec to lose control of GBH to Tan Sri Dato' Tan Hua Choo. Furthermore, the shares were sold at a price below the then market rate. The claim is based on, inter alia, breach of contract; unconscionable transaction; acting against a legitimate expectation; and acting against express representations.

(2) GBH was started by the Goh family over a 100 years ago and the Goh family had controlled the business since then until September 2006.

(3) In 1999, Ceramtec, a private limited company, also in control of the Goh family, held 37.8% of GBH's issues and paid-up capital. Other members of the family held approximately another 9%.

(4) Evidence of the Goh family's control of GBH and Ceramtec will be adduced at trial.

(5) In 1999, to meet with regulatory requirements, and to raise working capital, GBH decided to issue a private placement of 5.6 million shares to a Bumiputra investor — W Shalihudin b W Ibrahim ('Wan'). Wan is the Defendant in suit no. D2-22-240-2007.

(6) In order to finance the said private placement Wan took up a facility from International Bank of Malaysia Berhad ('IBMB'). IBMB subsequently merged with 6 other banking institutions to become Alliance Bank Berhad.

(7) Prior to this, GBH and the Goh family had enjoyed a long banker-customer relationship with IBMB and subsequently, Alliance Bank Berhad.

(8) The Bank offered Wan an overdraft facility in 1999 (the 'OD Facility').

(9) The OD facility was secured by a Memorandum of Deposit signed by Wan, through which Wan pledged his private placement shares to the Bank.

(10) In addition, the Bank requested for additional security. This was provided by Ceramtec by pledging 4 million of its GBH shares to the Bank. Ceramtec executed a 3rd Party Memorandum of Deposit ('3rd Party MOD') in favour of the Bank.

(11) All of these events occurred between 1999-2000 and are undisputed facts.

(12) In September 2000, based on verbal request by the Bank, Ceramtec pledged another 1.3 million of its GBH shares as additional security for the OD Facility.

(13) Although the tenure of the OD Facility meant that it should have expired on 24.02.2001, parties continued to conduct themselves on the basis that the facility was still operational.

(14) In March 2001, based on another verbal request by the Bank, Ceramtec pledged a further 3.2 million of its GBH shares to the Bank.

(15) In May 2001, the OD Facility was formally renewed in writing.

(16) At this point, Ceramtec had pledged some 8.6 million of its GBH shares to the Bank as security for the facility.

(17) Between 2001 to 2003, the OD Facility had gone into arrears several times. The Bank would regularly send reminders to Wan, copied to Ceramtec, but at no time was the OD Facility terminated and nor were Ceramtec's pledged shares ever touched.

(18) In December 2003, due to the OD facility being in arrears, the Bank's then CEO, Ng Siek Oman, contacted Ceramtec's business advisor, Tony Goh, to discuss the matter. After discussion between Tony Goh, Ng, and Wan, it was agreed that:

(a) Ceramtec would continue to pledge its GBH shares as security for the facility.

(b) Ceramtec would pledge more shares if requested to do so by the Bank.

(c) If the Bank were to ever consider force-selling Ceramtec's pledged shares, Ceramtec would always be notified and given the opportunity to redeem their pledged shares.

It was also emphasized to the Bank that Ceramtec's pledged shares were integral part of the Goh family's controlling stake in GBH. (the 'Collateral Contract').

(19) This Collateral Contract will be proved through evidence given by Ng Siek Chuan, Tony Goh and Wan.

(20) The OD Facility was again renewed in writing.

(21) Throughout 2004, the OD Facility remained in arrears. Despite many reminder letters to Wan, copied to Ceramtec, the Bank never terminated the facility and never touched Ceramtec's pledged shares. The Bank did however request for another further pledge of shares, and Ceramtec acquiesced by pledging another 2.8 million of its GBH shares. At this point, Ceramtec had pledged a total of 11,420,286 of its GBH shares to the Bank ('Ceramtec's Pledged Shares').

(22) Throughout 2005, the facility still remained in arrears and the Bank sent its usual reminders, but again, no action was taken. On 15.08.2005, Ceramtec received a letter demanding for all outstanding sums under the OD Facility to be paid within 7 days. Ceramtec did not act on this letter as it treated Ceramtec as a guarantor, which Ceramtec was not. In any event, no action was taken by the Bank against Ceramtec.

(23) In 2006, representatives of GBH wanted to discuss an outstanding facility

the Bank had provided to GBH. It was decided that Wan should also discuss the OD Facility with the Bank's new CEO, Bridget Lai.

(24) A meeting was fixed on 15.05.2006, where representatives of Ceramtec, GBH and Wan met up with Bridget Lai.

(25) At this meeting, it was agreed with Bridget Lai that GBH would be given time until the end of 2006 to pay off its outstanding facilities. In addition, the Bank agreed that the Wan would be given time until the end of 2006 to regularise the OD Facility.

(26) Evidence of this meeting will be testified to by Tony Goh, Wan, and Tan Ah Cheun, a representative of GBH.

(27) Then, in September 2006, Ceramtec discovered that the Bank had sold off its entire block of pledged shares in a single day in September 2006 (the 'Surreptitious Sale').

(28) Ceramtec was never given any notice of the Surreptitious Sale.

(29) Ceramtec attempted making enquries with the Bank, both verbal and written, but was met with stony silence on the Bank's part. It was only some 2 months later that the Bank responded, stating that the Surreptitious Sale was based on its letter of demand some 13 months earlier.

(30) It was subsequently discovered that Ceramtec's Pledged Shares had been sold to persons linked with the said Tan Sri Tan, who now had control of GBH and continues to do so.

(31) Evidence will be adduced showing that:

(a) The Surreptitious Sale was conducted in secret; by way of married deals and direct business transactions; and sold in parcels of below 5% of GBH's paid-up and issued capital so as to avoid the need of reporting to the Kuala Lumpur Stock Exchange.

(b) Bridget Lai subsequently left the Bank after an internal investigation which included the Surreptitious Sale.

(c) That the said Tan Sri Tan ultimately gained control of GBH due to the Surreptitious Sale.

(d) The Bank acted in clandestine and unconscionable manner in carrying out the Secret Sale.

(32) The Surreptitious Sale was wrongful for the following reasons:

(a) The Bank breached the Collateral Contract.

(b) Ceramtec, as a pledgor, was not given any opportunity to redeem its pledged shares.

(c) The Bank purported to rely on a demand which was 13 months old.

(d) Due to the behaviour and conduct of the parties over 7 years,

Ceramtec had a legitimate expectation that it should have been notified prior to the Surreptitious Sale; and been given an opportunity to redeem its shares.

(e) The representations made by the Bank on 15.05.2006 to the effect that no action would be taken until the end of 2006.

(f) The Bank, in not giving Ceramtec or Wan any notice, and subsequently refusing to confirm the sale; conducting the sale in secret; acting against its representations to Ceramtec and Wan; had acted unconscionably.

(g) The sale was conducted by dividing Ceramtec's Pledged Shares into parcels constituting less than 5% of the issued and paid-up capital of GBH, which meant that such sales need not have been reported to the Kuala Lumpur Stock Exchange.

(h) The shares were sold at a price below the prevailing market rate.

(i) Ceramtec's Pledged Shares, being a controlling block, should have been sold with a premium attached to it.

(j) The Surreptitious Sale was done through married deals or direct business transactions meaning the Bank would have known the identity of the purchasers.

(33) Due to the Bank's wrongful actions:

(a) Ceramtec lost its controlling stake in GBH.

(b) Ceramtec directly lost RM2.06 per share (RM 23, 525,789.00 in aggregate) for the block of Ceramtec's Pledged Shares due to the shares being sold at a low price,

(c) Ceramtec's remaining shares were bought by Tan Sri Tan at a low price causing Ceramtec to lose RM11,646,470.60.

[17] The defendant's summary of case in encl 39 reads as follows:

(1) The Plaintiff and Defendant entered into an Overdraft Facility ('OD Facility') pursuant to a letter of offer dated 24.12.1999 ('Offer Letter'). It was for the amount of RM9,273,000 for the purpose of financing the purchase of 5,629,000 units of private placement shares of Goh Ban Huat Berhad ('GBH') ('Placement Shares').

1.1. As security for the OD Facility, on 25.2.2000 a Facilities Agreement and a First Party Memorandum of Deposit pledging the Placement Shares ('MOD') were executed.

1.2. As further security, a 3rd Party Memorandum of Deposit dated 25.2.2000 ('3rd Party MOD') was executed by Ceramtec Sdn Bhd ('Ceramtec'), pledging 4,030,000 GBH shares ('Initial Pledge').

(2) During the course of the OD Facility, Ceramtec pledged further GBH shares whenever the drawing margin for the OD Facility was exceeded.

2.1. On 29.9.2000, Ceramtec pledged 1,380,286 GBH shares ('1st Further Pledge').

2.2. On 22.3.2001, Ceramtec pledged 3,200,000 GBH shares ('2nd Further Pledge').

2.3. End of 2004, Ceramtec pledged 2,810,000 GBH shares ('3rd Further Pledge').

(3) The OD Facility was not terminated upon the expiry of 1 year and was extended for another year. However, even after the expiry of the 1 year extension, the OD Facility was not revoked and it continued to exist. Throughout this period, Defendant would service the interest on the OD Facility and also authorised the Plaintiff to sell some of the Placement Shares to regularize the OD Facility.

(4) Towards the end of 2003, there were negotiations between the Plaintiff, the Defendant and Ceramtec concerning the Defendant's OD Facility. The details and terms of the negotiations are set out in paras. 11-14 of the Defence. This event culminated in the issuance of the 2nd letter of offer dated 17.12.2003 by the Plaintiff ('2nd Offer Letter'). I accepted the 2nd Offer Letter subject to payment of a facility fee of RM23,182 which was later reduced to RM15,000. This was paid.

(5) Under the 2nd Offer Letter, Ceramtec did continue to pledge 8,610,286 GHB shares.

(6) Also, during the course of the renewed OD Facility under the 2nd Offer Letter, Ceramtec did pledge another 2,810,000 GBH shares when there was security shortfall ('3rd Further Pledge'). This additional pledge is not in dispute by the Plaintiff.

(7) On 18.7.2005, the Plaintiff issued a letter of demand to the Defendant that the Defendant had breached the OD Facility and demanded the repayment of the OD Facility amounting to RM9,341,861.55 ('18.7.2005 LOD'). The Defendant did not pay the sum demanded and neither did the Bank commence legal proceedings to recover the same.

(8) About a year later, on 15.5.2006, there was a meeting between the CEO of the Plaintiff, Defendant and Ceramtec. During this meeting it was agreed that:

8.1. the Defendant would settle the OD Facility on or before 31.12.2006; and

8.2. the Plaintiff will not force sale the Placement Shares and the GBH shares pledged by Ceramtec under the 3rd Party MOD until after 31.12.2006.

(9) Sometime in late September 2006, the Defendant a large block of GBH shares had been forced sold off-market. The Defendant in view of what

had taken place contacted the Plaintiff but the Plaintiff was evasive. The Defendant was told by one Bernard Chen to write to the Plaintiff. This the Defendant did on 25.9.2006.

(10) On 15.10.2006, the Defendant received a letter signed by Bernard Chen that due to the Defendant's failure to regularise the OD Facility account, the Placement Shares and shares pledge by Ceramtec as third parties were forced sold. In mis respect, the Plaintiff referred to its letter dated 18.7.2005.

(11) Had the Plaintiff not acted in breach of the Collateral Contact and the agreement that was reached on 15.5.2006, the Defendant would not have suffered the losses in which is now claimed by the Plaintiff.

(See Annexure A for the breakdown of losses if the Defendant and Ceramtec were to redeem the shares

(i) in August 2005 when the demand was made or

(ii) in December 2006 pursuant to the agreement on 15.5.2006.)

PRELIMINARIES

[18] Six witnesses gave evidence for the defendant and Ceramtec, and five witnesses gave evidence for Alliance Bank. The parties have dealt with the evidence and contradictions in the submission in detail. On my part, I find Ceramtec's version relating to a collateral contract, inter alia, lacks jurisprudence, and also credibility, as the alleged collateral contract was not documented in any manner, except that it appeared for the first time in the pleadings. In addition, I do not find any basis in the evidence to say the sale was done in bad faith or otherwise to give any credence to the words 'surreptitious sale'. In my view, the words 'surreptitious sale' stands as an exaggeration from the commencement of the trial until the end of the submission.

[19] The main witnesses were, Goh Tai He (PW2) and Ng Soon Lai @ Ng Siek Chuan (PW4), and their evidence relating to the said collateral contract stands as a story and in this respect the submission of learned counsel for Alliance Bank has much merit, and the relevant parts read as follows:

11. The above two (2) witnesses are friends despite PW2's denial. Their testimonies are not to be believed not on this account alone. Both are astute and professional businessmen. Yet, neither one of them, in a private or official memorandum, or letter or e-mail or note, either to the Bank or to the board of directors of Ceramtec, wrote one word that confirms the existence of the collateral agreement alleged.

12. Is their evidence to be believed? PW4 effectively testified in cross-examination that he had practised a fraud or deceit on Alliance Bank by entering into this alleged collateral agreement with Ceramtec. PW4 testifies that he did not inform anyone in the Bank. Not his colleagues.

Not his fellow members of the Exco. Not any member of the Groups Special Assets Department. No one. It therefore comes as no surprise that the Bank does not know anything about this alleged collateral agreement.

13. Also, PW4 did not brief his successor CEO on this. His evidence is quite clear: He told absolutely no one. He kept it a secret.

14. PW4's conduct is also inconsistent. If we take everything he said in the witness stand as true, this means he gave certain assurances to Ceramtec. But, he was still employed by the Bank. He attended the Exco meetings. He kept quiet there. He then attended the Group Special Assets meeting. There, also, he kept quiet. And the evidence is clear: PW4 participated in decisions to sell Ceramtec's pledged shares. He was still with the Bank when the Bank issued the demand on Shalihudin on 18.7.2005. Again, PW4 kept quiet. Then on 15.8.2005, when the Bank made demand on Ceramtec, again, PW4 kept quiet.

15. So, therefore, PW4's conduct is clearly, with respect, dishonest. He testifies that he says one thing to one person (Tony Goh) and later says something completely contradictory to someone else (Alliance Bank).

16. Is it therefore safe to rely on the testimony of someone (ie PW4) who has, in effect testified before a court of law as to his own dishonesty, fraud and deceit? There should be no mistake about this: Ng Siek Chuan (PW4) is guilty of fraud and deceptive conduct. If his evidence is to be believed, he is in breach of nearly every duty in law that a CEO owes to the Bank including his fiduciary duty.

17. The question that arises: Is PW4 testifying in order to help his friend, Tony Goh (PW2)? How far can the court accept the evidence of such a person? The answer is quite clear: Not at all. PW4 is a witness of no credit by his very own admission.

18. And what about Tony Goh (PW2)? Can we believe his evidence? He has everything to gain from his evidence. He is an interested witness. More than that, he (and his family) stands to gain a pecuniary benefit from his evidence. Can we believe that Tony Goh (PW2) a Managing Director of a public listed company — GBH — would not write one single note; one memo; one e-mail or one letter referring to this alleged collateral contract? And that he never averred to this, not once in the period from December 2003 until September 2006? And once the Ceramtec shares were sold in September 2006, even then, not once, did he refer to this. What about Ceramtec's board of directors? If they had been briefed about this alleged collateral contract by Tony Goh (PW2) did they demand an explanation from Tony Goh (PW2)? Did Tony Goh (PW2) explain this to the board? Was there a minute of the board to discuss this? There is nothing. Nothing at all. No note, no discussion, no resolution, no briefing. Nothing. The entire allegation of a collateral contract is something created by Tony Goh (and Ceramtec) with the help of a friend: PW4.

[20] The defendant has relied much on the evidence led by Ceramtec to

pursue his claim and counterclaim. In essence the defendant is a borrower subject to facility terms. If there is a breach of any contractual terms his remedy lies within the Contracts Act 1950. Raising a counterclaim in the form of declaration does not subscribe to s 41 of the Specific Relief Act 1950. In my view it is an abuse of process of court. In consequence the declaratory prayers which are discretionary reliefs ought to have been dismissed in *limine*. In *Waja Manufacturing (M) Sdn Bhd (fomerly known as Palsticon Pet (M) Sdn Bhd) v Alliance Bank Malaysia Bhd and another appeal* [2011] 1 MLJ 611, I made the following observations:

> In addition to the above, I must say that declaratory orders stand as a discretionary relief. The nature of the prayers which the plaintiff is attempting to seek does not correspond with the complaint. Even if the complaint was established the evidence led will in the instant case will not move the court to grant such wide declaratory orders. In my view the plaintiffs complaint is related to a contractual breach at the most and the law is governed by the Contracts Act 1950 and the relief is provided within the four corners of the contract. A claim anchored on declaratory prayers ought to be dismissed in limine.

[21] Whether granting of declaratory reliefs are cultured for such purpose, must be explored in the right perspective. More so when the purpose of the declaratory relief is generally restricted to what is stated in s 41 of the Specific Relief Act 1950 which reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief.
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[22] In dealing with a similar section in India, *Deokali Koer v Kedar Nath* (1912) 39 Cal 704 the court had this to say:

> The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled' to any legal character or to any right as to nay property: It is the disregard of this that accounts for the multiform and at times, eccentric declarations which find a place in Indian plaints. If the courts were astute — as I think they should be — to see that the plaint presented conformed to the terms of s 42, the difficulties that are to be found in this class of cases would no longer arise. In the same case the learned judge said: 'It is a common fashion to attempt an evasion of court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour.'

[23] The learned authors of *'Pollock & Mulla, Indian Contract and Specific*

Relief Acts, 10th Edition, JL Kapur, NM Tripathi Private Ltd 1986' at p 1063 cited Indian cases, and one of which relates to these observations:

> It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

[24] I have heard the evidence, read the documents, and the lengthy submission of the parties in detail. I am grateful to learned counsel for placing a comprehensive submission on the evidence, contradictions, facts and law. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for Ceramtec and the defendant, I take the view that the claim by Alliance Bank against the defendant must be allowed, and the claim and counterclaim by Ceramtec and the defendant respectively against Alliance Bank, must be dismissed. My reasons, inter alia, are as follows:

(a) I have meticulously scrutinised the evidence repeatedly, and I find no evidence of collateral contract which can be sustained according to law. In this respect I agree with the submission of learned counsel for Alliance Bank that there was no collateral contract as alleged by the parties;

(b) Ceramtec complains that the sale of shares was wrongful in essence for the following reasons:

(i) breach of collateral agreement whereby the bank had agreed to give notice to Ceramtec, and to afford Ceramtec an opportunity to redeem the pledged shares;

(ii) breach of the representation and/or assurance given on 15 May 2006 meeting that no steps will be taken to sell the shares until the end of December 2006;

(iii) breach of the right of redemption of Ceramtec;

(iv) no reasonable notice was given;

(v) the notice dated 15 August 2005 had lapsed, and there was a delay of 13 months in respect of the sale; and

(vi) the notice was no longer effective as being superseded by intervening events by relying on a number of cases, and also the Contracts Act 1950, to assert that a giver of security has at law, a right to reasonable notice to redeem the security.

(c) The cases relied by Ceramtec can be summarised as follows:

(i) in *Miller v Cook*, the debenture provided that the lender had a power to sell the security upon default by the borrower, however, the debenture did not provide for any prior notice to be given to the borrower. It was held that it is oppressive for the lender not to give any notice of intended sale of the securities because this would extinguish the right of redemption of the borrower. Sir John Stuart VC stated:

> In the present case, besides the other objections to the contract, the terms of the power of sale are oppressive, and put the Plaintiff completely at the mercy of the defendant. The power to sell without any notice to the plaintiff enabled the defendant at any moment to extinguish the right of redemption.

(ii) in *Deverges v Sandeman*, the borrower granted the lender a mortgage over the borrower's shares in a company as security for the loan. The loan document was silent as to the right of the lender to sell the security and thus also silent as to the giving of any notice. It was held:

> According to those authorities it would seem to me that when no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mortgagor, and default must be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case … The notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage; and I think it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that, if he fails to avail himself of the opportunity given to redeem, the mortgagee will be in a position to put in force his rights.

(iii) in *Seow Mui Kim v Perwira Habib Bank* the pledgor was a third party pledgor of shares in a company to the bank as security for loans to the borrowers. The bank had sought to transfer and register the said securities in the name of its nominee. The third pledgor objected. The court held that the bank was entitled to do so to perfect its security, however, the court went on to state that nevertheless if the shares are to be sold, reasonable notice would have to be given to the third party pledgor. In this regard, the court also stated that it made no difference whether the shares held as security was by way of a mortgage or a pledge. It was stated by justice Gunn Chit Tuan:

> As in India there can be a pledge of shares and there can also be a mortgage of shares; whether it is one or the other will depend on the intention of the parties and the circumstances of each case (see Das J in *Arjun Prasad v Central*

Bank of India). For the purpose of a sale of shares the distinction between a mortgage and a pledge would not be material as in either case reasonable notice would have to be given.

(iv) Further, s 129 of the Contracts Act 1950 provides that reasonable notice must be given prior to any sale of a thing pledged. It provides that:

> If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise in respect of which goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor resonable notice of the sale.

(v) Justice Gunn Chit Tuan stated that s 129 of the Contracts Act 1950 applied to the pledge of shares as security in *Seow Mui Kim v Perwira Habib Bank* as follows:

> Mr Sri Ram considered that the transaction in this case was a pledge in which case the pawnee must give the pawnor reasonable notice of sale under s 129 of the Contracts Act 1950 (Revised – 1974) before he might sell the thing pledged. Both counsel for the applicants/defendants, however submitted that the transaction was a mortgage which by law, in the absence of an express power of sale, gives an implied right to the mortgagee to sell after giving reasonable notice. As our Contracts Act 1950, is similar to the Indian Contracts Act the position here would therefore be similar to that in India where shares are goods and therefore pledgeable. As in India there can be a pledge of shares and there can also be a mortgage of shares; whether it is one or the other will depend on the intention of the parties and the circumstances of each case (see Das J in *Arjun Prasad v Central Bank of India*). For the purpose of a sale of shares the distinction between a mortgage and a pledge would not be material as in either case reasonable notice would have to be given.

(d) In addition, learned counsel for Ceramtec asserts that: (i) the letter dated 15 August 2005 gave Ceramtec seven days to make payment, (ii) since no action was taken after the seven days it ought to have issued further notice of demand before the sale, and relies on a number of cases to drive home this point. They can be summarised as follows:

(i) In *Hock Huat Iron Foundry v Naga Tembaga Sdn Bhd* the Court of Appeal cited the following passage in *Luck v White* with approval:

> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing afresh limit, reasonable in the circumstances.

(ii) In *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* it was held:

The original stipulation in regard to time having been waived by the plaintiffs, in my view, before taking the present action for breach of contract, the plaintiffs should have given reasonable notice to the defendants requesting delivery within a stated period.

(iii) In *Charles Rickards v Oppenhaim* it was held:

If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter, it is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. The promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

(iv) In *Lingard's Bank Security Documents*, (4th Ed), pp 239–241 at p 241 wherein is stated:

If a demand becomes stale, it may be contended that it has been waived and afresh demand should be served.

(v) In *Wong Kup Sing v Jeram Ruber Estates Ltd* it was held:

Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid.

I do not find merit in Ceramtec's complaint, taking into consideration the factual matrix of the case, and specific terms that parties have agreed, which are not the basis for the decision in the cases which Ceramtec has relied on. The general principles of law cannot be applied in abstract when the contractual terms make those general principles of law inapplicable. In the instant case, there is much merit in the submission of the learned counsel for Alliance Bank which states as follows:

Ceramtec agreed to the terms of the 3rd Party Memorandum of Deposit. Clauses 3 and 15 show Ceramtec's express, written agreement that:

(i) Ceramtec has no right of redemption;

(ii) Ceramtec has no equity over the pledged shares;

(iii) Ceramtec does not have to be notified of the sale;

(iv) the Bank does not need Ceramtec's consent to sell the shares; and

(v) Clause 15 states, twice, that these rights conferred on Alliance Bank by Ceramtec are irrevocable.

(e) Learned counsel for Ceramtec has also invited the court to invoke s 114(g) of the Evidence Act 1950 for Alliance Bank's failure to call some of the witnesses who were relevant to deny Ceramtec's and the defendant's allegation. It is settled law that he who alleges must prove and this is also a strict requirement of the Evidence Act 1950. In the instant case, it must not be forgotten that Ceramtec and the defendant for the counterclaim stand as the plaintiffs for their respective case. I am not aware of any civil case where the court has compromised the burden of proof placed on the plaintiff by invoking s 114(g) of the Evidence Act 1950 in the manner learned counsel for Ceramtec is inviting the court to do so;

(f) I agree with learned counsel for Alliance Bank that the defendant has no defence. The counterclaim, for reasons stated earlier, has no substance, and is an abuse of process of court; and

(g) the complaint of surreptitious sale has no merit as the contractual terms provide for such sale. In addition, taking into consideration the volatile nature of share prices, it cannot be said to be unreasonable for the bank to sell shares in a surreptitious manner if the terms of the contract provide for, as in the instant case. It is my finding that Alliance Bank has not breached any of its obligations in the sale of share as provided in the facility terms and/or conducted itself unfairly in breach of the contractual terms. I do not find any surreptitious conduct as complained of by Ceramtec and the defendant.

[25] For reasons stated above, and after having heard submission on the issue of costs, I make the following orders:

(a) Alliance Bank's claim against the defendant in Suit No D2–22–240 of 2007 is allowed, as prayed and the defendant's counterclaim is dismissed. The defendant to pay costs in the sum of RM150,000 to Alliance Bank;

(b) Ceramtec's claim against Alliance Bank is dismissed with costs. Ceramtec to pay agreed costs in the sum of RM150,000 to Alliance Bank; and

(c) before extraction of the order for costs Alliance Bank to pay the allocatur fee, and the deputy registrar to issue the certificate for the allocatur.

[26] I hereby order so.

Plaintiff's claim against defendant allowed and claim and counterclaim by Ceramtec and defendant respectively against plaintiff dismissed.

Reported by Kanesh Sundrum